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Supreme Court, U.S.
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No. 04-359

In The
Supreme Court of the United States

EDWARD J. HABERERN, M.D.,

Petitioner,

v.

SPRAGUE AND SPRAGUE, a Law Firm, et al.,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Pennsylvania, Eastern District

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ALAN J. DAVIS, ESQUIRE
Counsel of Record
MARTIN C. BRYCE, JR., ESQUIRE
BALLARD SPAHR ANDREWS & INGERSOLL, LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103
215/665-8500

Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court will reverse an order of the Supreme Court of Pennsylvania where Petitioner never raised any federal question in either the state trial court, the state intermediate appellate court or in the Supreme Court of Pennsylvania?

2. Whether the Supreme Court of Pennsylvania applying Pennsylvania procedural rules properly denied Petitioner's attempts to appeal the dismissal of his case when it was undisputed that Petitioner did not attempt to appeal said dismissal until six months after the deadline to appeal had expired and Petitioner offered no legally justifiable excuse for his failure to comply with state law?

LIST OF PARTIES

Respondents are:

Sprague and Sprague, a Law Firm, Richard A. Sprague, Thomas A. Sprague, William H. Wolf, Jr., James J. West, H. Coleman Switkay, Vincent F. Presto, Marianne Fresco, Geoffrey C. Jarvis, Tracey Mooney Schaeffer, Joseph R. Podraza, Jr., Theodore J. Chylack, Joseph J. McAlee, Peter Konolige, T. Truxton Hare, III and David S. Lubin

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BRIEF IN OPPOSITION

Plaintiff/Petitioner Edward J. Haberern, M.D. ("Petitioner") fails to identify any federal question, much less an "important federal question," to justify the grant of certiorari in this matter. *See* 28 U.S.C. § 1957; U.S. S. Ct. R. 10. Contrary to Petitioner's arguments, the state courts in this state court case, which involved only issues of state law, properly applied well-established state law in dismissing his case and denying his attempts to appeal *nunc pro tunc*. Therefore, the Petition should be denied.

COUNTER-STATEMENT OF THE CASE

On October 24, 2001, Petitioner filed this action against Respondents alleging that they committed legal malpractice and fraud in the course of litigation on Petitioner's behalf. That litigation was concluded before the Court of Common Pleas of Lehigh County, Pennsylvania during proceedings on February 8 through 11, 1999. It was undisputed below that Petitioner was present in the courtroom during those proceedings, and personally witnessed the trial court enter judgment for Respondents on certain claims and explain in detail its grounds for the dismissal of those claims in that litigation in addition to agreeing to settle other claims before the Court.

In the summer of 1999, Petitioner replaced Respondents with his present counsel, who familiarized himself with the record and the issues no later than August, 1999. Nevertheless, well over two years elapsed before the present action was brought on October 24, 2001. Petitioner's claims were therefore barred by the applicable two

year statute of limitations and Respondents moved for summary judgment on January 11, 2002.

On April 3, 2002, the Court of Common Pleas of Philadelphia County, Pennsylvania, per the Honorable Renee Cardwell Hughes, granted Respondents' motion for summary judgment and dismissed this action with prejudice. The Court of Common Pleas' April 3, 2002 Order entering summary judgment bears the Court's stamp of the same date attesting that "copies [were] sent" pursuant to Rule 236 of the Pennsylvania Rules of Civil Procedure. The Court of Common Pleas' docket sheet further recites that the April 3, 2002 Order was entered April 8, 2002 and that "236 notice given." Indeed, Respondents' counsel received their copy of the Order on April 8, 2002.

Nevertheless, Petitioner failed to timely appeal from the April 3, 2002 Order. On December 6, 2002, over *seven* months after the entry of that order and over *six* months after the deadline to timely appeal, Petitioner sought leave to appeal *nunc pro tunc*. Petitioner, however, failed to offer any evidence of a fraud or breakdown in the operations of the Court of Common Pleas. Nor did Petitioner assert the existence of any federal question or issue in connection with his attempt to appeal *nunc pro tunc*.

In an Order dated February 28, 2003, and entered on March 5, 2003, the Philadelphia Court of Common Pleas denied Petitioner's Petition for Appeal *Nunc Pro Tunc*. Petitioner then filed a Petition for Review in the Superior Court of Pennsylvania on March 20, 2003. Once again, Petitioner failed to raise any federal issue.

In an Order entered May 6, 2003, the Superior Court of Pennsylvania denied Petitioner's Petition for Review. Petitioner then filed what he termed a "Petition for Allowance

of Appeal" with the Supreme Court of Pennsylvania which denied the same on January 30, 2004. The Supreme Court of Pennsylvania denied his subsequent "Application for Reargument" on April 26, 2004. At no point before the Pennsylvania Supreme Court did Petitioner raise any federal issue.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

There Is No Jurisdiction For The Requested Writ

It is well settled that the jurisdiction of this Court is predicated upon the existence of a federal issue in the state courts:

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

28 U.S.C. § 1257.

Thus, this Court has long held that "we have adhered to the rule in reviewing state court judgments under 28 U.S.C. § 1257 that we will not consider a petitioner's

federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review." *Adams v. Robertson*, 520 U.S. 83, 86 (1997) (citations omitted). Consequently, this Court will not consider a federal issue raised for the first time in a petition for a writ of certiorari. *See Monks v. State of New Jersey*, 398 U.S. 71 (1970) (dismissing writ of certiorari as "improvidently granted" where federal constitutional issue "has been raised for the first time upon this writ and the state courts have had no opportunity to pass upon it."). *See also Illinois v. Gates*, 462 U.S. 213, 218 (1983) (Supreme Court lacks "jurisdiction unless a federal question had been both raised and decided in the state court below").

Furthermore, Rules 10(b) & (c) of the United States Supreme Court require that a petition for writ of certiorari present an important federal question and provide that such a petition is granted only where:

> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals
>
> (c) a state court . . . has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

In the present case, Petitioner *never* raised any federal issues, much less an "important federal question," in the Pennsylvania state courts. Although he now purports to assert his rights under the Seventh and Fourteenth

Amendments to the United States Constitution, he *never* even cited them below much less raised any argument under the United States Constitution. Rather, Petitioner's arguments below were limited solely to whether the Pennsylvania state courts had properly applied their procedural rules when dismissing his case and then refusing to hear any appeal from that dismissal.

Accordingly, under well-settled and long-standing jurisprudence in this Court, Petitioner's petition for a writ of certiorari should be denied.

The Pennsylvania Courts Properly Declined To Hear Petitioner's Untimely Appeal Under Well-Established Pennsylvania Procedural Rules

Under well-settled Pennsylvania law, the Order entered by the Court of Common Pleas on March 5, 2003 was a final order as it left nothing further to be done in the case. *See, e.g.*, *Commonwealth v. Johnson*, 550 Pa. 298, 705 A.2d 830 (1998). Consequently, pursuant to Rules 902 and 903 of the Pennsylvania Rules of Appellate Procedure, if Petitioner wished to appeal from that decision he had to file a notice of appeal on or before April 4, 2003. The rules governing appeals to the Pennsylvania appellate courts are crystal clear: "the notice of appeal required by Rule 902 (manner of taking appeal) shall be filed within 30 days after the entry of the order from which the appeal is taken." Pa. R. App. P. 903(a). As previously stated by the Supreme Court of Pennsylvania: "In order to perfect an appeal, parties must strictly adhere to the statutory provisions for filing an appeal." *Criss v. Wise*, 566 Pa. 437, 441, 781 A.2d 1156, 1159 (2001). Petitioner, however, failed to file any notice of appeal.

Instead, Petitioner filed his Petition for Review in the Superior Court which cited Rules 1502 and 1561(b) of the Pennsylvania Rules of Appellate Procedure as well as 42 Pa. C.S. §§ 708(c) and 742. However, Rules 1502 and 1561, as well as section 708, deal solely with appeals from determinations of state agencies. Section 742 provides that the Superior Court has "appellate jurisdiction of all appeals from final orders of the courts of common pleas." Of course, in order for the Superior Court to have appellate jurisdiction, Petitioner had to file a timely notice of appeal which he failed to do. It is well settled that the Superior Court "is without jurisdiction to excuse a failure to file a timely notice, as the 30-day period must be strictly construed." *Valley Forge Center Assocs. v. Rib-It/K.P., Inc.*, 693 A.2d 242, 245 (Pa. Super. 1997). Petitioner's "Petition for Review" could *not* serve as a notice of appeal. *Thermo-Guard, Inc. v. Cochran*, 408 Pa. Super. 54, 61, 63, 596 A.2d 188, 192 (1991) ("Nor is there anything in the rules that suggests that an improperly filed petition for permission to appeal should or may be treated as a notice of appeal . . . where a petition for permission to appeal seeking review of a final order, appealable as a right . . . is filed, this court should simply deny the petition"); *Mash v. Old Home Manor, Inc.*, 298 Pa. Super. 7, 10, 444 A.2d 147, 149 (1982) (petition to review improperly brought pursuant to chapter 15 of the Rules of Appellate Procedure quashed: "since this appeal is one covered by Chapter 9 of the Rules, Chapter 15 does not apply."). Accordingly, the Superior Court could have properly denied Petitioner's Petition for Review for that reason alone.

In any event, the Court of Common Pleas properly denied Petitioner's Petition for Appeal *Nunc Pro Tunc*. As a general rule, under well-settled Pennsylvania law an

appeal *nunc pro tunc* may only be granted in certain "extraordinary" circumstances. *Criss*, 566 Pa. at 441, 781 A.2d at 1159. Specifically, "an appeal *nunc pro tunc* may be granted where a fraud or breakdown in the court exists or where the late filing is not the result of an attorney's negligent conduct." *Gargano v. Terminix Internat'l Co.*, 784 A.2d 188, 192 (Pa. Super. 2001). Absent a fraud or a breakdown in the court, an appeal *nunc pro tunc* will only be permitted where the appellant establishes: (1) the notice of appeal "was filed late as a result of non-negligent circumstances either as they relate to the appellant or the appellant's counsel"; (2) "the appellant filed the notice of appeal shortly after the expiration date" and (3) the appellee was not prejudiced by the delay. *Criss*, 566 Pa. at 442, 781 A.2d at 1159. Petitioner failed to offer any argument or evidence to justify an appeal *nunc pro tunc*.

Petitioner never attempted to allege any fraud in the Court of Common Pleas. Nor did Petitioner offer any evidence of, or establish, any breakdown in the operations of the Court of Common Pleas. Consequently, Petitioner's Petition for Appeal *Nunc Pro Tunc* was premised on his allegation of a mere failure to receive notice of the order. However, it is well settled under Pennsylvania law that "[m]ere allegations of a failure to receive notice are insufficient cause for allowing an appeal *nunc pro tunc*." *Board of Pensions & Retirement of the City of Phila. v. Jackson*, 126 Pa. Cmwlth. 551, 554, 560 A.2d 310, 312 (1989). *Accord In re Annexation*, 2 Pa. Cmwlth. 496, 502, 276 A.2d 549, 552 (1971) (allegation of non-receipt of order insufficient to demonstrate breakdown of court's operations); *In re Condemnation of McCoy Property*, 15 Pa. D. & C. 4th 388, 393 (York 1992) (same). Indeed, there never was any reason to ever suspect any breakdown in the Court of

Common Pleas' operations. On the contrary, both the April 3, 2002 Order and the Court's docket sheet attest that notice was mailed, and defense counsel received their copy by mail in due course. *See Commonwealth Dep't of Transp. v. Grasse*, 146 Pa. Cmwlth. 17, 21, 606 A.2d 544, 545 (1991) (because of "rebuttable presumption that the mailed [notice] was received" appeal *nunc pro tunc* could not be permitted based solely on appellant's denial of receipt of notice).

Accordingly, Petitioner failed to establish any ground supporting his appeal *nunc pro tunc*. The Superior Court properly denied Petitioner's Petition for Review for the independent reason that he failed to comply with Rules 902 and 903 of the Pennsylvania Rules of Appellate Procedure, as well as Petitioner's failure to establish grounds for an appeal *nunc pro tunc*. Thereafter, the Supreme Court of Pennsylvania properly declined to hear Petitioner's appeal.

CONCLUSION

For all of the foregoing reasons, Respondents respectfully request that the Court deny Petitioner's Petition for a Writ of Certiorari.

Respectfully submitted,

ALAN J. DAVIS
Counsel of Record
MARTIN C. BRYCE, JR.
BALLARD SPAHR ANDREWS
& INGERSOLL, LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103
215/665-8500

Attorneys for Defendants / Respondents Sprague and Sprague, a Law Firm, Richard A. Sprague, Thomas A. Sprague, William H. Wolf, Jr., James J. West, H. Coleman Switkay, Vincent F. Presto, Marianne Fresco, Geoffrey C. Jarvis, Tracey Mooney Schaeffer, Joseph R. Podraza, Jr., Theodore J. Chylack, Joseph J. McAlee, Peter Konolige, T. Truxton Hare, III and David S. Lubin

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